No. 76-1846

In the Supreme Court of the United States

OCTOBER TERM, 1977

ARIZONA POWER AUTHORITY, ET AL., PETITIONERS

v.

CECIL D. ANDRUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-39a) is reported at 549 F. 2d 1231. The opinion of the district court (Pet. App. C, 41a-54a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1977. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 28, 1977 (Pet. App. B, 40a). The petition for a writ of certiorari was filed on June 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the allocation of electrical power generated at Colorado River Storage Project facilities among Northern

and Southern Division preference customers is committed by law to the Secretary of the Interior's discretion.

2. Whether, in any event, the Secretary abused his discretion in basing the allocation upon the particular market criteria he selected.

STATUTES INVOLVED

The relevant provisions of the Colorado River Storage Project Act, 70 Stat. 105, 107, 109, 43 U.S.C. 620c, 620f, and of the Reclamation Project Act of 1939, 53 Stat. 1187, 1194-1195, 43 U.S.C. 485h(c), are set forth at Pet. 2-3.

STATEMENT

In 1956 Congress enacted the Colorado River Storage Project (CRSP) Act, 70 Stat. 105, 43 U.S.C. 620 *et seq.*, for the purpose of facilitating development of the Upper Colorado River Basin.[1] Pursuant to this Act, the Secretary constructed several large dams with attendant facilities for generating hydroelectric power. The installed generating capacity of these facilities is 1,260,000 kilowatts (Pet. App. A, 8a).

The construction costs of these facilities is to be recaptured in large part by sales of hydroelectric power (Pet. App. A, 9a). The Bureau of Reclamation of the Department of the Interior, under the direction of the Secretary, is responsible for marketing power from all federal hydroelectric facilities on the Colorado River, including, besides CRSP, facilities in the Lower Basin constructed and operated pursuant to the Boulder Canyon Project Act of

[1]The Colorado River Compact divides the entire Colorado River Basin into an Upper Basin and a Lower Basin, with the dividing point at Lee's Ferry, Arizona (Pet. App. A, 4a). For a comprehensive discussion of the development of the Colorado River Basin, see *Arizona* v. *California*, 373 U.S. 546, 550-564.

1928, 45 Stat. 1057, 43 U.S.C. 617 *et seq.*; the Boulder Canyon Adjustment Act of 1940, 54 Stat. 774, 43 U.S.C. 618 *et seq.*; and the Parker-Davis Project Act of 1954, 68 Stat. 143 (Pet. App. C, 42a). Unless provided otherwise by statute, all such power is sold as the federal reclamation laws prescribe. These laws include Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1187, 1195, 43 U.S.C. 485h(c), which provides that municipalities, public corporations or agencies, cooperatives, and other nonprofit organizations shall be given a "preference" in sales or leases of electricity (Pet. App. A, 9a-10a; Pet. App. C, 43a). Agencies and organizations entitled to such a preference are termed preference customers (Pet. App. A, 10a).

In the 1950's, the Secretary confronted the problem of allocating the low-cost power that would soon flow from the CRSP dams then under construction. On March 9, 1962, after considering the Federal Power Commission's survey of markets and the Bureau of Reclamation's recommendations, the Secretary announced the general power Marketing Criteria (Pet. App. A, 10a-11a). The Criteria divided the Colorado basin into two marketing areas: a Northern Division consisting of Colorado, New Mexico, Wyoming and Utah, and a Southern Division consisting of Arizona and certain portions of California and Nevada (Pet. App. A, 5a n. 7).[2]

The Marketing Criteria provided for a permanent allotment of 80 percent of the summer season CRSP power and 93 percent of the winter CRSP power to Northern Division preference customers, with the remaining 20 percent of summer power and 7 percent of winter power

[2]The Northern and Southern Divisions established by the Marketing Criteria closely correspond to the Upper and Lower Colorado Basins as defined by the Colorado River Compact (Pet. App. A, 4a-5a and n. 7).

allocated to Southern Division preference customers (Pet. App. A, 11a-12a).[3] However, because power marketing surveys indicated that preference customers in the relatively undeveloped Northern Division would not be able to use all of their permanent allocation for several years, the Marketing Criteria further provided that power permanently allotted to the Northern Division, but in excess of its current demands, would be temporarily marketed in the Southern Division, subject to withdrawal upon three years' notice (*id.* at 12a).

The Secretary then sent out purchase contract application forms for CRSP power to potential preference customers. All application forms contained a clause whereby prospective customers were required to acknowledge the Marketing Criteria, including the Secretary's authority to withdraw power which had been permanently allocated to the Northern Division (Pet. App. A, 12a-13a). Twenty-seven Southern Division preference customers, including all of the petitioners except the Arizona Power Authority,[4] purchased CRSP power under contracts by which they acknowledged the Secretary's authority to withdraw certain of the power for future use in the Northern Division (*id.* at 13a).

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[3]In making this allocation, the Secretary took into account that all of the power generated at federal facilities situated in the Lower Basin is sold to Southern Division customers. When the entire Colorado Basin is taken as a unit, the Southern Division customers receive 58.3 percent of the summer power and 52.8 percent of the winter season power (Pet. App. C, 46a).

[4]The Arizona Power Authority filled out a purchase application form but struck out the provision acknowledging the Marketing Criteria; consequently, the Secretary rejected the application form and no CRSP power was sold to the Authority. The Authority did not seek judicial review of the Secretary's rejection of its application (Pet. App. A, 13a).

In December 1970, the Secretary notified Southern Division customers that he would give notice not later than March 31, 1973 that CRSP power permanently allocated to the Northern Division would be withdrawn from Southern Division customers beginning with the 1976 summer season (*ibid.*). In December 1971, the Arizona Power Authority and seven Arizona preference customers filed this action to have the Marketing Criteria declared null and void, and to enjoin the Secretary from withdrawing any CRSP power currently marketed in the Southern Division (*ibid.*). The Secretary's answer contended, among other things, that the issuance and implementation of the Marketing Criteria were within his lawful authority, and he moved for summary judgment (Pet. App. C, 50a).[5]

The district court held that the Marketing Criteria were within the Secretary's lawful authority and not arbitrary or capricious (Pet. App. C, 52a). The court of appeals affirmed on the ground that the Secretary's allocation of CRSP power among the Northern and Southern Division preference customers was not subject to judicial review, because Congress had not articulated any statutory standards against which the Secretary's allocation could be measured, *i.e.*, there was "no law to apply" (Pet. App. A, 36a-37a).

ARGUMENT

The decision of the court of appeals, on whose opinion (Pet. App. A, 1a-39a) we principally rely, is correct and presents no issue of general importance warranting review by this Court.

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[5]The Northern Division Power Association, an association representing Northern Division preference customers, was authorized to intervene as a defendant (Pet. App. A, 14a n. 28).

1. The Administrative Procedure Act, 5 U.S.C. 701(a)(2), precludes judicial review of "agency action * * * committed to agency discretion by law." Thus, although the Act generally favors judicial review of agency actions, Section 701(a)(2) provides a narrow exception "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410. The court of appeals, recognizing this presumption in favor of judicial review (Pet. App. A, 14a), considered the Colorado River Storage Project Act and its lengthy legislative history with great care, and correctly concluded that Congress has not provided any legal standards that the courts may employ in reviewing the Secretary's allocations of CRSP power among Northern and Southern Division preference customers.

There is nothing in the CRSP Act or its legislative history that provides a standard by which to judge the Secretary's action. The Secretary is authorized by the CRSP Act to enter into contracts for the sale of federal power generated at CRSP facilities, 43 U.S.C. 620c, 485h(c). Unless otherwise provided by law, federal contracting officers normally have considerable discretion to select the customers to whom federal properties are to be sold. "The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it." *Arizona* v. *California*, 373 U.S. 546, 580.

Congress placed no statutory limitations upon the Secretary's discretion to allocate CRSP power contracts among Northern and Southern Division preference customers. As the court of appeals recognized (Pet. App. A,

17a-18a), the text of the CRSP Act itself contains no provisions which arguably restrict the Secretary's discretion to allocate CRSP power contracts. Nor do petitioners themselves specify any such provisions. Petitioners do, however, argue that the legislative history of the CRSP Act, as distinct from the text of the Act itself, discloses a congressional intent to restrict the Secretary's authority to allocate CRSP power among Northern and Southern Division preference customers (Pet. 9-15). The court of appeals, as its opinion demonstrates, carefully examined the legislative history (including each of the references cited by petitioners); and it correctly rejected petitioners' argument.

The Colorado River Storage Project was, in its original proposed form, a controversial plan which received considerable attention in Congress. The original CRSP bills contained, *inter alia*, a power marketing provision requiring that all contracts with customers outside the Upper Basin must provide for termination or modification to the extent necessary to meet the demand for power from Upper Basin States (Pet. App. A, 20a). These provisions were attacked for giving nonpreference private customers in the Upper Basin priority over preference customers in the Lower Basin (Pet. App. A, 19a-20a). In addition, some critics contended that the project would fail to generate sufficient revenue if the Secretary were restricted to selling the CRSP power in the then undeveloped Upper Basin (Pet. App. A, 20a-21a).

To meet these criticisms, Congress amended the bills to permit the Secretary to maximize revenues by selling power to Lower Basin customers while at the same time retaining the usual reclamation law preferences for public bodies and nonprofit organizations. However, as the court of appeals observed, no one at the congressional hearings objected to

the original power marketing restrictions on the ground that the Lower Basin States would be deprived of their fair share of CRSP power (Pet. App. A, 24). Accordingly, when the House Committee remarked that the bill had been amended so that the States would be "on the same basis," it meant only that the original requirement permitting nonterminable power allocations only to Upper Basin customers had been deleted, and a new provision added which would permit the Secretary to market the CRSP power wherever he deemed best in order to maximize power revenues in a manner consistent with the usual reclamation law preferences (Pet. App. A, 24a-25a, 35a).

The entire legislative history, when read in context, shows that Congress did not intend to establish any particular standard for the allocation of CRSP power between Upper and Lower Basin customers.[6] The isolated bits of legislative history upon which petitioners rely, taken in context, support the view that Congress intended to grant the Secretary a great degree of flexibility in the allocation of CRSP power among preference customers. This is, as the court of appeals correctly concluded, a case in which Congress chose not to provide a "controlling standard for CRSP power distribution" and instead committed

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[6]Petitioners here, as in the court below (Pet. App. A, 36a-37a), have failed to articulate any specific standard by which Congress intended to govern allocations of CRSP power among Upper and Lower Basin preference customers. As the court of appeals correctly observed, petitioners' suggestion (Pet. 10-11) that the standard for allocation is the "same basis" is no standard at all, since the "same basis" could be interpreted to require allocation on the basis of each state's population, its number of preference customers, its past or projected energy needs, or its percentage allocation of water under the Colorado River or the Upper Colorado River Basin Compacts (App. A, 36a-37a). It could even mean that each of the seven states would receive one-seventh of the power.

"the decision—with certain express limitations not applicable here—to the discretion of the Secretary" (Pet. App. A, 37a).

2. Moreover, even if the Secretary's allocation were subject to judicial review, the district court properly concluded that the criteria issued by the Secretary are "within his statutory authority * * * reasonable, and not arbitrary or in abuse of his discretion" (Pet. App. C, 50a). As our discussion in Point I demonstrates, Congress intended to allow the Secretary broad discretion in allocating CRSP power so as to maximize revenues while respecting the reclamation law preferences.

Although Congress chose not to place specific limitations on the Secretary's discretion, the court of appeals properly concluded that the legislative history of the CRSP Act "evidenced an intent to promote primarily the development of the upper division states" (Pet. App. A, 35a). It noted that the "message of [the] debates is clear: both legislative bodies intended the upper (northern) division states to be eventually the primary beneficiaries of the legislation. * * * Congress intended some type of geographic preferences in favor of the states of the upper division" (Pet. App. A, 35a).

Against this background, the allocation of 80 percent of summer power and 97 percent of the winter CRSP power to the Upper Division states was a proper exercise of the Secretary's discretion. Taking into account this allocation of CRSP power, the Lower Basin states will be receiving 58.3 percent of the total power from all the Colorado River Basin power plants, and 52.8 percent of the winter power (Pet. App. C, 46a). Moreover, as the district court concluded, these criteria constitute a long-standing administrative interpretation that is entitled to great deference (Pet. App. B, 52a). They were adopted

in 1962 on the basis of a series of "extensive studies and reports" in which most preference customers from both the Upper and Lower Basins participated (Pet. App. B, 51a).

As the district court stated (Pet. App. C, 52a):

> Since the criteria, approved by two Secretaries of Interior, were based on careful, prolonged studies by experts in the field pursuant to known and fixed guidelines and in accord with statutory authority, the criteria as decided upon by the Secretary and here under attack cannot be said to be arbitrary, capricious, or unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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